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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MARVIN GERALD HENSON, Defendant and Appellant.	B217899 (Los Angeles County Super. Ct. No. TA104165)

APPEAL from the judgment of the Superior Court of Los Angeles County. Eleanor J. Hunter, Judge. Affirmed.

Murray A. Rosenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela Hamanaka, Assistant Attorney General, Susan Sullivan Pithey and Catherine Okawa Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant Marvin Gerald Henson (defendant) was charged by information with six counts of second degree robbery pursuant to Penal Code section 211 and six counts of felony false imprisonment pursuant to Penal Code section 236. Special gang enhancement allegations were also charged in connection with the robbery counts pursuant to Penal Code section 186.22, subdivision (b)(1). The jury convicted defendant on all counts, except count 5 which was dismissed during trial, and found true the gang enhancement allegations. Defendant raises two issues on appeal. First, defendant contends three of the false imprisonment convictions (counts 8, 9 and 11) are not supported by substantial evidence of imprisonment effected by violence or menace as required by statute. Second, defendant argues there is insufficient evidence supporting the gang enhancement findings. We affirm.

FACTS

Defendant acknowledges he is a member of the criminal street gang known as the Raymond Avenue Crips. Their territory is located in south Los Angeles. In October 2008, defendant went to a Carl's Jr. restaurant in Harbor City with another Raymond Avenue Crips member, Altavian Reed (Reed), and a third male referred to only as R Mac. Defendant and his two accomplices robbed the restaurant, forcibly directing employees to take them to the manager, open the safe and turn over the money. All three robbers acted like they had weapons. While defendant and R Mac retrieved the money from the restaurant manager, Reed told the customers not to move. The entire robbery took place over a matter of minutes, and then defendant, Reed and R Mac fled the restaurant.

DISCUSSION

1. The false imprisonment counts

Defendant contends there is insufficient evidence to support the jury's findings that three customers at the Carl's Jr., Carlos Contreras (count 8), Roberto Garcia (count 9), and Jules Bittar (count 11), were falsely imprisoned by violence or menace. We disagree.

" 'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]' " (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; accord, *People v. Staten* (2000) 24 Cal.4th 434, 460 [" 'critical inquiry' " is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt].) We must confirm that the evidence supporting the verdict is " 'reasonable, credible, and of solid value,' " but refrain from reweighing the evidence and substituting our evaluation of the credibility of witnesses for that of the trier of fact. (*Ochoa*, at p. 1206.) This same standard applies whether the evidence is direct or circumstantial. (*People v. Prince* (2007) 40 Cal.4th 1179, 1251.)

"False imprisonment is the unlawful violation of the personal liberty of another." (Pen. Code, § 236.) The violation of liberty may result from restraining, confining or detaining an individual. " ' " 'Any exercise of force, or express or implied threat of force, by which in fact the other person is deprived of his liberty or is compelled to remain where he does not wish to remain, or to go where he does not wish to go, is false imprisonment. The wrong may be committed by acts or by words, or both, and by merely operating upon the will of the individual or by personal violence, or both. . . .' " ' " (*People v. Riddle* (1987) 189 Cal.App.3d 222, 228, italics omitted; accord, *People v. Dominguez* (2010) 180 Cal.App.4th 1351, 1360-1361 [" 'Threats can be exhibited in a myriad number of ways, verbally and by conduct' "].)

In order to elevate the crime to a felony, as was charged here, the restriction of the victim's liberty must be by "violence or menace." (Pen. Code, § 237.) CALCRIM No. 1240 defines violence as "physical force that is greater than the force reasonably necessary to restrain someone." (See also *People v. Babich* (1993) 14 Cal.App.4th 801, 806-807.) Menace in turn, is defined in pertinent part as "a verbal or physical

threat of harm" which threat "may be express or implied." (CALCRIM No. 1240; *People v. Reed* (2000) 78 Cal.App.4th 274, 280.) There is no evidence that physical force was used to detain any of the three customers. However, there was substantial evidence of false imprisonment by menace.

Ana Morales (Morales), one of the cashiers working that evening, testified she remembered seeing defendant and his accomplices, Reed and R Mac, standing near the counter while she was taking orders from other customers. She stated all three acted like they had weapons "under their sweaters" although she did not actually see any weapon. Morales further testified she heard Reed tell the customers not to move or go anywhere. It appeared that all customers in the lobby heard his command, moved away from the doors, and sat down at various booths.

Just before the robbery started to unfold, Aleph Esquivel[1] entered the Carl's Jr. restaurant with his two cousins, Marcos and Jose Esquivel, and friends Monique Hugar, Jules Bittar (Bittar), Mayra Chavez, Carlos Contreras, and Roberto Garcia. Aleph noticed defendant and his accomplices near the counter, but they did not appear to be ordering food. Rather, they were looking "intently" toward the employees and the area behind the counter. He and Bittar ordered and went to get their drinks. After Aleph got his drink, he looked over at the "rest of [his] friends," who looked "stunned"; they were just standing and staring toward the employees and the back of the restaurant. He heard a woman scream. Aleph further testified that after the robbers left, his friends still seemed and sounded scared to him.

As Marcos entered the restaurant, he also noticed defendant and his accomplices near the counter. One of the robbers wearing a hood acted like he had a weapon concealed in his waistband. He went behind the counter and whispered something to the male cashier. The cashier put his hands in the air and was directed

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[1] We refer to Aleph and his two cousins by their first names to avoid confusion given their common surname.

toward the back of the restaurant. Marcos heard a woman scream. At that same time, Marcos and his brother Jose start to move backwards toward the doors. Reed had stayed in the lobby area and told them, "Don't go anywhere." Marcos testified he was scared, and his entire group sat down after they were told not to move. No one from his group left the restaurant.

Jose also testified and corroborated the robbers were near the counter as their group of friends entered the Carl's Jr. He saw the robber with the "hoodie" go behind the counter to one of the cashiers, and he believed the restaurant was "getting robbed." Jose testified that while he did not actually see a weapon, he was afraid and wanted to back up and try to leave; but Reed told them, "You're not going anywhere."

Defendant argues there is insufficient evidence in the record as to whether or not Bittar, Carlos Contreras, and Roberto Garcia felt threatened because none of them testified at trial. However, there is adequate circumstantial evidence of a threat of harm directed to all of the customers if any of them tried to leave. An express threat of specific harm or use of a deadly weapon is not required to establish menace. (*People v. Castro* (2006) 138 Cal.App.4th 137, 143 [testimony showing defendant made lewd comments to girl, briefly grabbed her arm and pulled her toward his car sufficient to support felony false imprisonment]; accord, *People v. Wardell* (2008) 162 Cal.App.4th 1484, 1491 and *People v. Aispuro* (2007) 157 Cal.App.4th 1509, 1513.)[2]

"The uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable." (*People v. Scott* (1978) 21 Cal.3d 284, 296; *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.) Circumstantial evidence may be relied upon to the same extent as direct evidence to prove or disprove the elements of a crime. (*People v. Morrow* (1882) 60

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[2] (But see *People v. Matian* (1995) 35 Cal.App.4th 480, 483 [felony false imprisonment conviction reversed and modified to misdemeanor where sexual assault victim felt restrained to stay seated in chair outside attacker's office because he glared at her but did not threaten further harm if she moved.)

Cal. 142, 145-146; CALCRIM No. 223.) "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the . . . jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." (*People v. Maury* (2003) 30 Cal.4th 342, 403; see also *People v. Holt* (1997) 15 Cal.4th 619, 668 [if record justifies jury's findings, opinion of reviewing court that circumstantial evidence might also be reasonably interpreted to support a contrary result does not warrant a reversal].)

It is true, as defendant points out, that evidence which raises only a suspicion of guilt is not sufficient. (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) But the record here contains strong circumstantial evidence supporting the felonious false imprisonment of Bittar, Contreras, and Garcia by means of an implied threat of harm.

2. The gang enhancement

Defendant argues the jury's true findings as to the gang enhancement allegations are not supported by substantial evidence and must be reversed. Once again, we must disagree.

Penal Code section 186.22, subdivision (b)(1) (hereafter section 186.22), provides in relevant part that "any person . . . convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony . . . be punished as follows: [¶] . . . [¶] (C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years." Defendant contends there is insufficient evidence establishing he committed the robbery of the Carl's Jr. to promote or benefit the Raymond Avenue Crips or with the specific intent to so promote or benefit the gang. Defendant argues the evidence shows at best he and his accomplices robbed the restaurant to get money for alcohol, without any specific intent to benefit activities of

the gang. He relies primarily on two Ninth Circuit decisions interpreting the statute as requiring a showing that a defendant had a specific intent to promote or assist in criminal conduct of the street gang beyond that of the predicate felony, i.e., *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099 (*Garcia*) and *Briceno v. Scribner* (9th Cir. 2009) 555 F.3d 1069 (*Briceno*).

Garcia and *Briceno* embrace an interpretation of section 186.22 based on words that are not part of the express statutory language. The statute provides that the specific intent necessary is that which promotes, furthers *or* assists "*any* criminal conduct by gang members." (§ 186.22, subd. (b)(1), italics added.) The statute does not use the phrase "*other* criminal conduct" or otherwise indicate that criminal conduct by the gang over and above the predicate felony charged is required. We therefore decline to follow *Garcia* and *Briceno*.

This district has already so held. "While our Supreme Court has not yet reached this issue, numerous California Courts of Appeal have rejected the Ninth Circuit's reasoning. As our colleagues noted in *People v. Romero* (2006) 140 Cal.App.4th 15, 19: 'By its plain language, the statute requires a showing of specific intent to promote, further, or assist in "*any* criminal conduct by gang members," rather than *other* criminal conduct. (§ 186.22, subd. (b)(1), italics added.)' Thus, if substantial evidence establishes that the defendant is a gang member who intended to commit the charged felony in association with other gang members, the jury may fairly infer that the defendant also intended for his crime to promote, further or assist criminal conduct by those gang members." (*People v. Vazquez* (2009) 178 Cal.App.4th 347, 353-354 (*Vasquez*); accord, *People v. Hill* (2006) 142 Cal.App.4th 770, 774 [Third District]; *People v. Leon* (2008) 161 Cal.App.4th 149, 162-163 [Fourth District].)

The evidence here was sufficient to support the jury's findings on the gang enhancement allegations. Detective Jose Corrales (Corrales), the investigating officer from the Los Angeles Sheriff's Department, interviewed Reed when he turned himself

in, executed a waiver form, and agreed to speak with Corrales about the robbery of the Carl's Jr. Corrales testified that Reed denied being a member of the Raymond Avenue Crips but admitted he "hung out" with the gang. Reed also told Corrales he had the moniker of "Scotty 3" and he'd known defendant for approximately three years. Corrales further testified Reed admitted that he, defendant, and a third person whom he knew only by the moniker R Mac had been at Helen Keller Park, decided they needed money and went to the Carl's Jr. to rob it. Reed also admitted he was assigned the role of crowd control in the robbery. During the interview, Reed confirmed Raymond Avenue Crips commonly wear Colorado Rockies baseball hats to indicate their gang, and he believed defendant was wearing such a hat during the robbery. Reed also told Corrales that after the robbery, he, defendant, and R Mac divided the money among them. Reed's share was $1,000, which he used to buy two pairs of Black Label pants, several dress shirts, alcohol, and marijuana.

Detective Corrales also interviewed defendant after his arrest and waiver of rights. Defendant admitted knowing Reed from the neighborhood, that Reed had been "jumped" into the gang a little while back, and that Helen Keller Park was a Raymond Avenue Crips hangout.

The prosecution also presented the testimony of Kenneth Brown, a detective with the gang investigation unit of the Los Angeles Sheriff's Department.[3] Detective Brown testified to various aspects of gang culture generally as well as specific information related to the Raymond Avenue Crips, including documentation of their existence as a violent street gang since the 1980's; current membership of approximately 330 active members; use of the initials "RC," "RAC," and the phrase "world famous"; hand signals; designated turf by street boundaries; identification of Helen Keller Park as a park "claimed" by the gang as their turf; and primary criminal

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[3] Expert testimony may be offered as proof in support of the section 186.22 elements. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047-1048.)

activities ranging from vandalism to murder, including prior convictions of other current members.

Detective Brown also testified to specific facts about defendant including that, in his opinion, he is an active member of the Raymond Avenue Crips based on his tattoos showing the gang initials "RAC" and "1-2-0" designating the 120th Street subset of the gang, as well as Brown's prior contact with defendant in the field in association with other members of the gang. In addition, Brown identified various field identification cards completed by other deputies documenting contacts with defendant in which his gang affiliation was noted and verified. Brown further attested to and explained the significance of certain items obtained from defendant's home pursuant to a warrant, including a notebook containing Raymond Avenue Crips graffiti.

Detective Brown explained the commission of this type of robbery elevates the stature within the gang of the members who participated. It established them as hard core gang members willing to do whatever it takes to further the gang. The crime helped "create an atmosphere of fear and intimidation within the community, not only that they control or they claim, but also with rival gang members knowing that they will do whatever it takes to protect their neighborhood, to promote themselves, to promote the gang." Moreover, it immediately benefited the gang members who were rewarded with a share of the money stolen from the Carl's Jr.

From this evidence the jury could fairly find that defendant, a Raymond Avenue Crips member, wearing a hat intended to assert gang affiliation and coming from a known gang hangout immediately before committing the crime, intended to commit the robbery to promote, further, or assist criminal conduct within the meaning of the gang enhancement statute. (*Vazquez*, *supra*, 178 Cal.App.4th at pp. 353-354.) The fact the Carl's Jr. was not located on Raymond Avenue Crips turf is insufficient to render infirm the balance of the evidence in support of the gang enhancement allegations. (*People v. Martinez* (2008) 158 Cal.App.4th 1324.)

DISPOSITION

The judgment is affirmed.

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GRIMES, J.

We concur:

BIGELOW, P. J.

RUBIN, J.